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91-106

Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

BESSIE CARPENTER LOCUS,
Petitioner

V.

FAYETTEVILLE STATE UNIVERSITY,
Respondent

Petition For Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

I. DOES THE COURT OF APPEALS' HOLDING IN THIS CASE VIOLATE PETITIOINER'S RIGHTS AS ENUNCIATED IN ***LYTLE V. HOUSEHOLD MANUFACTURING***, 494 U.S. 543, 108 L. Ed. 2d 504, 110 S. Ct. 1331 (1990)?

II. WAS THE DISTRICT COURT'S REFUSAL TO AMEND JUDGMENT PURSUANT TO FED. R. CIV. P. 52 CLEARLY ERRONEOUS?

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STATEMENT OF THE CASE

The original complaint in this action was filed May 30, 1986 alleging four causes of action against three defendants. The complaint alleged a cause of action against Fayetteville State University (FSU) for sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and a claim of retaliatory discharge brought under the same law. The complaint reincorporated the same allegations stated in the sex discrimination claim as a cause of action under 42 U.S.C. § 1983, claiming Dr. Robert Lemons, in his official capacity as officer, administrator and agent of FSU, violated plaintiff's rights under

the Fourteenth Amendment. The retaliatory discharge allegations were reincorporated as a pendent state claim for intentional infliction of emotional distress against plaintiff's immediate supervisor, Mr. James Scurry. Ms. Locus, the appellant-plaintiff, amended her complaint on October 28, 1987 to allege a civil conspiracy claim and name additional defendants.

Judge Malcolm Howard granted the defendants' summary judgment motion on the civil conspiracy claim and dismissed all of the individual defendants from the case in their entirety. The United States Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of the individual defendants by order entered March 8, 1989. Ms. Locus did not file an appeal.

On May 2, 1989, Ms. Locus moved the court to vacate the judgment entered June 2, 1988 dismissing the action as to defendants Dr. Robert Lemons, Dr. Charles A. Lyons, Mr. James Scurry, Dr. Valeria Fleming, Mr. Matthew Jamond, and Dr. Robert James individually and in their official capacities. Ms. Locus, also, sought to file a second amended complaint to add defendants, claims and increase the amount of compensatory and punitive damages sought. The trial court denied the petitioner's Rule 60(b) and Rule 15(b) motions.

Subsequently, on July 31, 1989, Ms. Locus requested leave to file a third amended complaint. On August 7, 1989, Judge Howard denied her request.

On September 18, 1989, Ms. Locus moved to stay or continue the action and allow further discovery. In an order dated September 22, 1989, Judge Howard denied the requested continuance and ruled against additional discovery.

On October 4, 1989, Ms. Locus moved for a voluntary dismissal of the retaliation claim brought against FSU. By order dated October 16, 1989, Judge Howard allowed Ms. Locus' motion to voluntarily dismiss the retaliation claim against FSU.

A non-jury trial was held on October 23rd and 24th of 1989, with Judge Howard presiding in Raleigh, North Carolina. On November 7, 1989, the court denied Ms. Locus' claims and dismissed the action, ruling the petitioner was to recover nothing from FSU. On November 21, 1990, Ms. Locus moved for a new trial or for additional and amended findings; she also wanted Judge Howard to vacate the May 20, 1988 judgment. On November 30, 1989, Judge Howard entered an order denying Ms. Locus' motion for a new trial, motion to amend findings and motion to vacate the May 20, 1988 judgment. FSU's motion for costs was also denied. Notice of Appeal, from the November 7, 1989 judgment, was given by Ms. Locus on December 22, 1989. The case was argued on October 30, 1990 and affirmed by unpublished opinion on January 7, 1991. On March 14, 1991, Ms. Locus' petition for rehearing was considered by the Fourth Circuit in banc. No member of the entire Fourth Circuit panel even wanted a poll on the petition. Accordingly, it was unanimously denied.

On September 2, 1988, shortly before the statute of limitations, and after all the claims against the individual defendants were dismissed in federal court, Ms. Locus filed a state court complaint alleging the same events that were the subject of the federal lawsuit.

In response to Ms. Locus' state court complaint, the respondent first moved to stay the proceedings and then answered the complaint asserting various defenses including: failure to

state a claim, lack of jurisdiction, sovereign immunity, qualified immunity, good faith exercise of the responsibility conferred upon them to make a professional judgment regarding petitioner's qualification for employment and the intra-corporate conspiracy doctrine. Respondent submitted memoranda in support of the defenses on August 21 and August 29, 1989. On November 8, 1989, transcripts of the depositions of various defendants were submitted by respondent's counsel. On November 17, 1989, supplemental authority pertaining to Ms. Locus' intentional infliction claim was submitted. On November 22, 1989, a motion for collateral estoppel and issue preclusion based on the federal court judgment rendered against Ms. Locus was submitted. Ms. Locus never responded. The Senior Resident Superior Court Judge, D.B. Herring, Jr., ruled on all the motions, except the preclusion motion, on November 27, 1989. Judge Herring did not consider the preclusion motion because it had not been filed ten days before the hearing for all pending motions. The order of dismissal was entered December 5, 1989. Ms. Locus appealed on January 2, 1990. On April 16, 1991, the Court of Appeals affirmed the dismissal of FSU and all official capacity claims. The court remanded the case to allow Ms. Locus an additional opportunity to oppose the respondent's Rule 56 motion for summary judgment. On June 4, 1991, Superior Court Judge Joe Freeman Britt granted the respondent's summary judgment and claims preclusion motions. The petitioner subsequently appealed the court's dismissal. The appeal is still pending.

STATEMENT OF FACTS

The petitioner is a female resident of Fayetteville, North Carolina. (Petitioner's Appendix p. 2a, hereinafter App. p.) The respondent is a constituent institution of the University of North Carolina and is located in Fayetteville, North Carolina. (App. p. 2a) The petitioner worked as an Administrative Assistant in the

Career Planning and Placement Office of FSU from March 1984 through August 1986. (App. pp. 2a-3a) FSU advertised a vacancy for the position of Academic Advisor in the Division of General Studies on June 3, 1985. (App. p. 3a) The job responsibilities included advising students on curriculum matters, teaching orientation classes, counseling students and developing computer modules. (App. p. 3a) Additionally, the Academic Advisor was required to set up public address equipment and perform a moderate amount of lifting and carrying. (App. p. 3a) Fifteen people applied for the job; Dr. Robert Lemons, the Head of the Division of General Studies, selected eight women and three men to be interviewed. (App. pp. 3a-4a) The petitioner was interviewed by Dr. Lemons on June 28, 1985. (App. p. 4a) Dr. Lemons worked on the same floor as the petitioner and had previously evaluated her performance in instructing a freshman orientation class. (App. pp. 6a-7a) Dr. Lemons had a greater knowledge of the petitioner's work and more opportunity to evaluate her work than that of any other candidate. (App. p. 7a) Dr. Lemons recommended a male, Gerard Winfrey, for the position on July 3, 1985. (App. p. 5a) The recommendation of Mr. Winfrey was never approved and the Academic Advisor position was never filled. (App. p. 5a) On May 14, 1985, two months before Dr. Lemons recommended Mr. Winfrey, respondent's task force concluded that academic advisement should be moved out of the Division of General Studies into individual departments. (App. pp. 9a-10a)

Mr. Winfrey had greater experience setting up the public address equipment and expressed a greater willingness to do so than did the petitioner. (App. p. 8a) At the time of his application, Mr. Winfrey was earning twenty-one thousand, five hundred dollars ($21,500) per year. The Academic Advisor position paid twenty thousand, two hundred and fourteen dollars ($20,214) per year. Ms. Locus was earning between fifteen and sixteen thousand dollars ($15,000 to $16,000) per year. (App. p. 8a)

Mr. Winfrey was applying for a lateral move. Ms. Locus was applying for a promotion. (App. pp. 8a-9a)

SUMMARY OF ARGUMENTS

In this brief the respondent argues that the Court should not grant the petition for writ of certiorari because the petitioner has failed to show that the decision below is in conflict with any applicable decision of this Court or any other circuit and has failed to show any other special or important reason for granting the writ.

I.

The Court of Appeals' holding does not violate the petitioner's right to a jury trial in a § 1983 action. All individual defendants were dismissed from the case and that dismissal was affirmed prior to the Title VII trial.

II.

The district court's refusal to amend judgment pursuant to Fed. R. Civ. P. 52 is not an issue which merits this Court's review. It is axiomatic that petitioner's complaint that she was better qualified is factually specific and uniquely personal.

REASONS WHY WRIT SHOULD NOT ISSUE

I. THE COURT OF APPEALS' HOLDING IN THIS CASE DOES NOT VIOLATE THE PLAINTIFF'S RIGHT TO A JURY TRIAL IN A § 1983 ACTION BECAUSE THE 42 U.S.C. § 1983 CLAIM WAS PROPERLY DISMISSED.

The petitioner makes a fundamental misstatement by indicating the district court in its March 8, 1988 order, "only dismissed the petitioner's civil conspiracy claim." The order clearly states "this action is dismissed as to Dr. Robert Lemons, Dr. Charles Lyons, Mr. James Scurry, Dr. Valeria Fleming, Mr. Matthew Jarmond, and Dr. Robert James, individually and in their official capacity." (App. p. 40a) The court of appeals affirmed the dismissal of the individual defendants when this order was appealed in 1988. After a Title VII trial against the one remaining defendant, FSU, the petitioner again appealed. The second appellate panel noted the "Appellate argues that the district court erred by dismissing James Scurry as a defendant in 1988" and . . . "also challenges the district court's 1988 order dismissing Dr. Lemons as an individual defendant in her Section 1983 suit." (App. pp. 31a and 33a) The petitioner seeks to cast the second appellate court decision as upholding "a total injustice [by] allowing Dr. Lemons to escape personal liability for his actions solely on the basis of the adverse Title VII claim of which he did not have an interest." (App. p. 24) In fact, Dr. Lemons and all the individual defendants were dismissed after they made a summary judgment motion. The petitioner made no appeal and raised the issue for the first time, after trial, on November 20, 1989, by requesting Rule 60 relief. Petitioner argued the May 23, 1988 dismissal of the individual defendants was incorrect on substantive grounds. The district court correctly noted Rule 60 allows relief from a judgment which contains a clerical mistake or which was entered through mistake or inadvertence. The

district court reiterated that it intended by its 1988 order to dismiss the individual defendants and the order was affirmed.

Although not cited by petitioner, the case of ***Lytle v. Household Manufacturing***, 494 U.S. 543, 108 L. Ed. 2d 504, 110 S. Ct. 1331 (1990) summarizes his argument. This Court held that the Seventh Amendment precludes according collateral estoppel effect to a district court's determination of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims. At the beginning of the trial, the district court dismissed Lytle's § 1981 claims concluding that Title VII provided the exclusive remedy for his alleged injuries. The Court of Appeals affirmed the Title VII judgment but noted the dismissal of the § 1981 claims were erroneous because Title VII and § 1981 remedies are separate, independent and distinct. As distinguished from the ***Lytle*** case, two appellate courts have concluded that dismissal of the § 1983 claim was correct. (App. pp. 24a, 33a and 41a-59a) In ***Lytle***, the court resolved the equitable claims first solely because it erroneously dismissed the legal claims. In this case, the legal claims were dismissed and the dismissal affirmed before the equitable claims were ever tried. Neither the appellate court reviewing the dismissal prior to the Title VII trial, nor the appellate court reviewing the district court's refusal to grant Rule 60(b) relief, found error.

II. THE DISTRICT COURT'S REFUSAL TO AMEND JUDGMENT PURSUANT TO FED. R. CIV. P. 52 IS NOT AN ISSUE WHICH MERITS THIS COURT'S REVIEW.

The petitioner contends this Court should issue a writ because the district court's findings of fact and conclusions of law were clearly erroneous. It is axiomatic that petitioner's complaint is factually specific and uniquely personal. No special and important reasons are given as to why the Court should

exercise judicial discretion and accept review. No conflict among court decisions is noted. In substance, as the district court noted in denying the petitioner's motion for a new trial or for amendment of judgment: "the plaintiff merely restates the arguments she made at trial." (App. p. 19a)

The district court and the appellate court justifiably rejected Ms. Locus' arguments. This Court is simply not presented with an appendix record that would allow review even if this Court were so inclined. The standard of review under Fed. R. Civ. P. 52(a) was first enunciated in ***United States v. United States Gypsum Co.***, 333 U.S. 364, 92 L. Ed. 746, 68 S. Ct. 525 (1948), **reh'g denied,** 333 U.S. 869, 92 L. Ed. 1147, 68 S. Ct. 788 (1948). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (emphasis added) **Id.** at 396; ***see also Anderson v. Bessermer City***, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 528, 105 S. Ct. 1504, 1511 (1985) (if the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the reviewing court cannot reverse); ***see also Amadeo v. Zant***, 486 U.S. 214, 100 L. Ed. 2d 249, 108 S. Ct. 1771 (1988) (the "clearly erroneous" standard of review is a deferential one; the district court's decision must be upheld if the court's account of evidence is plausible in light of the record reviewed in its entirety.) Some courts have held that a reviewing court should not consider a contention that a finding of fact was in error without a record on appeal that includes all the evidence on which the district court might have based its findings. ***E.g.***, ***Jensen v. United States,*** 326 F.2d 891 (9th Cir. 1964).

Petitioner failed to present an adequate appendix to allow review according to the applicable standard. Complete review would show the district court's decision was clearly correct. Mr.

Winfrey was the best qualified candidate for a position that was never even filled.

CONCLUSION

Insofar as the petitioner has failed to show that the decision below is in conflict with any applicable decision of this Court or any other circuit and has failed to show any other special or important reason for granting a writ of certiorari in this case, the respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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